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Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MR. FURNITURE WAREHOUSE, INC., ET AL.

Petitioners,

v.

BARCLAYS AMERICAN/COMMERCIAL, INC., ET AL.

Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION OF MR. FURNITURE WAREHOUSE, INC., ET AL., FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

(1) Whether the Eleventh Circuit Court of Appeals properly determined, under Florida law, that punitive damages were not available against Respondent in the proceeding below because Petitioner had presented no evidence from which a reasonable jury could find that Respondent should be held vicariously liable for such damages for the conduct of an employee who was neither a managing agent of Respondent nor even at fault for the underlying tort.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. MR. FURNITURE'S PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE IT IS PREMISED UPON AN ISSUE NOT RAISED OR ADDRESSED BELOW AND REQUESTS, UNDER THE GUISE OF DUE PROCESS, THAT THE COURT IMPOSE A BLANKET RULE REQUIRING FLORIDA TO IMPOSE PUNITIVE DAMAGES IN VICARIOUS LIABILITY SITUATIONS 5

A. MR. FURNITURE FAILED TO RAISE ITS DUE PROCESS CLAIM IN EITHER THE DISTRICT COURT OR THE COURT OF APPEALS AND THUS IS PRECLUDED FROM RAISING IT AT THIS TIME 6

B. MR. FURNITURE PERVERTS *HASLIP* AND REQUESTS THAT THE COURT REQUIRE FLORIDA TO EXPAND THE AVAILABILITY OF PUNITIVE DAMAGES TO SITUATIONS IN WHICH FLORIDA HAS CHOSEN NOT TO IMPOSE THEM 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page

Bankers Multiple Line Ins. Co. v. Farish,
464 So.2d 530 (Fla. 1985) 5

Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.,
492 U.S. 757, 109 S. Ct. 2909 (1989) 6, 9

Lawn v. United States,
355 U.S. 339 (1958) 7

Mercury Motors Express, Inc. v. Smith,
393 So.2d 545 (Fla. 1981) 5, 8

Miree v. DeKalb County,
433 U.S. 25 (1977) 6

Pacific Mutual Life Ins. Co. v. Haslip,
111 S. Ct. 1032, 499 U.S. ___ (1991) 6

Tennessee v. Dunlap,
426 U.S. 312 (1976) 6

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION OF MR. FURNITURE WAREHOUSE, INC. ET AL., FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE AND FACTS

Respondent BARCLAYS AMERICAN/ COMMERCIAL, INC. ("BARCLAYS") is a commercial factor which purchases the accounts receivable of third parties, its clients, who are generally manufacturers or wholesalers of goods, including furniture, and advances the amount of the receivables to its clients for a fee. (R3-113 Patterson *Aff. ¶¶4, 5*). In accepting or purchasing a particular receivable BARCLAYS makes a preliminary decision whether such purchase will be on a "credit approved" basis. By factoring on a "credit approved" basis, BARCLAYS agrees to assume the credit risk on payment of such receivable. (R3-113 Patterson *Aff. ¶6*) If the obligor on the receivable, the retail or wholesale purchaser of goods from BARCLAYS' client, fails to pay, BARCLAYS suffers the economic loss (R14-258-8).

Petitioners, companies operating under the trade name "MR. FURNITURE," are engaged in the retail sale of furniture in South Florida. At various times between 1981 and 1987, BARCLAYS declined to factor, on a credit approved basis, MR. FURNITURE's purchase orders submitted for factoring by furniture manufacturers who used BARCLAYS as their factor.

Decisions as to whether receivables will be factored on a "credit approved" basis are made by various credit officers and assistants within BARCLAYS' "credit units." (R3-113 Stenhouse *Aff. ¶5*). These units are divided by industry, and individual credit officers and assistants within the units are assigned responsibility for specific clients. (R3-113 Stenhouse *Aff. ¶4*)

Each credit unit has a unit head, who is required to approve requests for credit which exceed a certain amount.

(R14-258-111) James Stenhouse ("Stenhouse") is a unit head in BARCLAYS' furniture credit department and an assistant vice president of BARCLAYS. (R14-14 to 16) Stenhouse is one of approximately twenty assistant vice presidents, subordinate to thirty vice presidents and senior vice presidents (R14-258-15). Stenhouse does not participate in the formulation of company policy (R14-17) and has never even participated in any meetings with members of BARCLAYS' senior management. (R14-258-113).

One of MR. FURNITURE's requests for credit approval reached Linda Strickland ("Strickland"), a BARCLAYS credit officer and a subordinate to Stenhouse. During a conversation with a sales representative for the furniture manufacturer with whom MR. FURNITURE had placed the order in question, Strickland allegedly stated that MR. FURNITURE was "building up inventory and credit limits to go out of business." (SR2-282-9). Some months later, Stenhouse was contacted by the principal of MR. FURNITURE and learned for the first time of MR. FURNITURE's existence and its previous inability to obtain credit approval from BARCLAYS. (R14-149; R15-259-149; R15-259-196).

In February 1987, MR. FURNITURE brought suit against BARCLAYS and Stenhouse for, *inter alia*, defamation based on Strickland's statement, and sought punitive damages. Notwithstanding the fact that Stenhouse had no involvement with MR. FURNITURE until after the defamatory statement, MR. FURNITURE claimed that Stenhouse somehow either knew of or directed Strickland's comment, as a result of alleged past personal animosity toward MR. FURNITURE's president and his family. Stenhouse was later dismissed, however, as a defendant.

The defamation claim proceeded to trial solely against BARCLAYS on a theory of *respondeat superior*. The jury found in favor of MR. FURNITURE as to Strickland's statement but awarded only nominal damages. (R18-261-643). After the verdict, the District Court directed a verdict for BARCLAYS on the punitive damages issue, finding that the record contained no evidence from which a reasonable jury could determine that BARCLAYS should be held vicariously liable under Florida law for Strickland's defamatory statement. (R13-253).

MR. FURNITURE appealed to the Eleventh Circuit Court of Appeals, contending, to the extent relevant here, that the District Court erred in granting a directed verdict on the punitive damages issue. MR. FURNITURE (a) repeated its unsupported allegation that Strickland's statement was either known to or directed by Stenhouse and (b) suggested in turn that Stenhouse was of sufficient stature at BARCLAYS to permit attribution of his alleged fault to BARCLAYS for purposes of punitive damages liability.

The Eleventh Circuit affirmed the directed verdict. Applying Florida law, which prohibits imposition of punitive damages under the doctrine of *respondeat superior* in the absence of fault on the part of a managing agent or primary owner of the corporate employer, the Eleventh Circuit held that Stenhouse was not a managing agent of BARCLAYS and that Strickland's statement was not in any event traceable to Stenhouse.

SUMMARY OF ARGUMENT

MR. FURNITURE's Petition for Writ of Certiorari suggests that the criteria in Florida for imposition of punitive damages under the doctrine of *respondeat superior*,

established by the Florida Supreme Court in *Mercury Motors Express, Inc. v. Smith*, 393 So.2d 545 (Fla. 1981) and applied by the Eleventh Circuit below, somehow violate the Due Process Clause of the Fourteenth Amendment. MR. FURNITURE failed to raise its "constitutional claim" in either the District Court or the Court of Appeals and thus such claim is not properly before this Court. In any event, MR. FURNITURE has no due process right to a federally imposed expansion of the punitive damage doctrine applied in Florida, and thus its Petition for Writ of Certiorari should be denied.

ARGUMENT

I. MR. FURNITURE'S PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE IT IS PREMISED UPON AN ISSUE NOT RAISED OR ADDRESSED BELOW AND REQUESTS, UNDER THE GUISE OF DUE PROCESS, THAT THE COURT IMPOSE A BLANKET RULE REQUIRING FLORIDA TO IMPOSE PUNITIVE DAMAGES IN VICARIOUS LIABILITY SITUATIONS.

Under Florida law, as enunciated by the Florida Supreme Court, before a corporate employer may be held vicariously liable for punitive damages under the doctrine of *respondeat superior*, there must be proof of some fault on the part of a managing agent or primary owner of the corporation. *Bankers Multiple Line Ins. Co. v. Farish*, 464 So.2d 530, 533 (Fla. 1985); *Mercury Motors Express, Inc. v. Smith*, 393 So.2d 545, 549 (Fla. 1981). The Florida legislature has been applying this common law principle for several years and it remains intact.

Against this backdrop, MR. FURNITURE generically questions the wisdom of this rule as a matter of policy, Petition for Writ of Certiorari at *i¶¶1,2,* and more specifically suggests that Florida's decision not to make punitive damages against corporate employers more broadly available somehow violates the Due Process Clause of the Fourteenth Amendment. *Id.* at ¶3. Relying upon this Court's recent decision in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 499 U.S. ___ (1991), in which the Court held that an Alabama rule imposing punitive damages under the doctrine of *respondeat superior* without requiring fault did not violate the employer's due process rights, 111 S. Ct. at 1041, MR. FURNITURE suggests that the absence of an identical rule in Florida constitutes a due process violation. As demonstrated below, these contentions are not properly before the court, turn *Haslip* on its head, and accordingly do not raise a legitimate due process issue.

A. MR. FURNITURE FAILED TO RAISE ITS DUE PROCESS CLAIM IN EITHER THE DISTRICT COURT OR THE COURT OF APPEALS AND THUS IS PRECLUDED FROM RAISING IT AT THIS TIME

MR. FURNITURE did not raise its due process argument in either the District Court or the Court of Appeals. This claim is thus not properly before this Court. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 757, 109 S. Ct. 2909, 2921 (1989) (Court declined to consider due process challenge to punitive damage award where petitioner failed to raise due process claim before District Court or Court of Appeals); *Miree v. DeKalb County*, 433 U.S. 25, 34 (1977) (Court would not consider claim not pleaded, argued or briefed in either the District Court or Court of Appeals); *Tennessee v. Dunlap*,

426 U.S. 312, 316 n.3 (1976) (same); *Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958) (same).[1/]

B. MR. FURNITURE PERVERTS *HASLIP* AND REQUESTS THAT THE COURT REQUIRE FLORIDA TO EXPAND THE AVAILABILITY OF PUNITIVE DAMAGES TO SITUATIONS IN WHICH FLORIDA HAS CHOSEN NOT TO IMPOSE THEM

In *Haslip*, the Court expressed considerable concern about the scope and potentially unlimited *expansion* of punitive damage awards. 111 S. Ct. at 1038-1040. Faced with an existing Alabama rule, however, permitting punitive damage liability under the doctrine of *respondeat superior* without an independent showing of fault by a managing agent or owner so long as the employee acted within the scope of his employment, the Court, in deference to state prerogative, held that such rule was a rational exercise of the state's authority. *Id.* at 1041. By no stretch of the imagination did this Court hold that this rule was constitutionally mandated in the first instance or that other states were required to dispense with existing common law mechanisms requiring a showing of fault by the employer prior to the imposition of punitive damages.

1/ MR. FURNITURE's implicit suggestion that its alleged due process claim was unavailable until *Haslip* lacks merit. "The constitutional status of punitive damages ... is not an issue that is new to this Court." *Haslip*, 111 S. Ct. at 1040. In view of the legacy of constitutional challenges in the punitive damages context, *id.* at 1038-1040, MR. FURNITURE certainly could have raised its constitutional challenge earlier in this proceeding.

Attempting to use *Haslip* as a sword, MR. FURNITURE suggests, without elaboration, that Florida's employment of the fault criterion is somehow a violation of due process. In support, MR. FURNITURE asserts only that Florida's interest in preventing torts would be served by adoption of the Alabama rule and that the decision of the Florida Supreme Court in *Mercury Motors* is in reality a violation, rather than the expression, of Florida's interest in this regard. Petition for Writ of Certiorari at 10.

This contention is fundamentally flawed. Whatever the merits of the fault requirement as a mater of policy, MR. FURNITURE has no due process right to a federally imposed change of Florida policy. It is not fundamentally unfair to MR. FURNITURE to be required to prove "some fault" on BARCLAYS' part in order to recover punitive damages from BARCLAYS. MR. FURNITURE's Petition is nothing more than an open, unsupported invitation to this Court to impose, on policy rather than constitutional grounds, an expansion of punitive damage availability which the Florida legislature and courts have refused to adopt. This invitation contravenes the most recent Court pronouncement in the punitive damage context:

> In a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are *questions of state law*...
>
> ....
>
> Although petitioners... would like us to craft some common-law standard of excessiveness... these are matters of state, and not federal, common law. Adopting a rule along the lines petitioners

> suggest would require us to ignore the distinction between the state law and federal law issues. For obvious reasons we decline that invitation.

Browning-Ferris, 109 S. Ct. at 2922 (emphasis added).

The Court's pronouncement in the excessiveness context in *Browning-Ferris* applies with equal force here. The fact that one state's mechanism for assessing punitive damages passes constitutional muster does not mean that all states must employ that mechanism. Neither the Florida legislature nor the Florida courts have found it advisable to abandon the "some fault" requirement for imposition of punitive damages in vicarious liability situations. MR. FURNITURE's attempt to enlist this Court to establish a common law rule expanding the availability of punitive damages in Florida makes MR. FURNITURE's petition an improper candidate for certiorari, and it should be denied.

CONCLUSION

MR. FURNITURE's Petition for Writ of Certiorari improperly raises an alleged constitutional claim never raised in the District Court or Court of Appeals and, on the basis of MR. FURNITURE's dissatisfaction with the policy underlying a rule enunciated by the Florida Supreme Court, invites the Court to invade the state's prerogative and expand the availability of punitive damages contrary to the determinations of the Florida courts. The Eleventh Circuit properly interpreted Florida law in this case and that interpretation easily passes constitutional muster.

BARCLAYS respectfully requests that the Court deny MR. FURNITURE's Petition in this cause.

Respectfully submitted,

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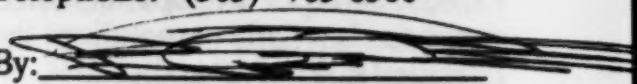
By: 
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